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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,

Appellants,

v.

UNITED STATES OF AMERICA, ET AL.

On Appeal from the United States District Court for the Southern District of Texas.

JURISDICTIONAL STATEMENT

Appellants, The Atchison, Topeka and Santa Fe Railway Company; Chicago, Rock Island and Pacific Railroad Company; Fort Worth and Denver Railway Company; and Missouri-Kansas-Texas Railroad Company, intervening plaintiffs in the court below, submit this statement disclosing the basis upon which the Supreme Court has jurisdiction, on appeal, to review the judgment of the District Court entered in this action.

OPINIONS BELOW

The opinion of the District Court is reported at 257 F. Supp. 243. The court's opinion and its final judgment are reproduced herein as Appendix A (App. 1-10) and Appendix B (App. 11-12), respectively. The report and order of the Interstate Commerce Commission at issue appear at 325 I.C.C. 400 and are reproduced herein as Appendix C (App. 13-27).

JURISDICTION

This action was brought in the United States District Court for the Southern District of Texas by the City of Galveston and the Board of Trustees of the Galveston Wharves; Galveston Cotton Exchange and Board of Trade; Houston Port Bureau, Inc.; Harris County-Houston Ship Channel Navigation District; Gulf Atlantic Warehouse Co.; and Manchester Terminal Corporation under 28 U.S.C., Sections 1336, 1398, 2284, and 2321-2325, and 5 U.S.C., Section 1009, to enjoin, set aside, and annul an order of the Interstate Commerce Commission issued under 49 U.S.C., Section 3(1). The railroad appellants intervened as parties plaintiff pursuant to 28 U.S.C., Section 2323. The judgment of the District Court dismissing the complaint was entered on August 11, 1966. Notice of appeal was filed in that court on October 7, 1966, by the railroad appellants. A separate notice of appeal was filed by the original plaintiffs.

Jurisdiction of the Supreme Court to review the decision of the District Court is conferred by 28 U.S.C., Sections 1253 and 2101(b), and is sustained by many decisions, including *Mechling Barge Lines* v. *United States*, 376 U.S. 375 (1964).

STATUTES INVOLVED

Section 3(1) of the Interstate Commerce Act, 49 U.S.C., Section 3(1):

> It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, . . . locality, port, port district, . . . in any respect whatsoever; or to subject any particular person, . . . locality, port, port district, . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . .

Section 8(b) of the Administrative Procedure Act, 5 U.S.C., Section 1007(b):

> All decisions . . . shall . . include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; . . .

Section 10(e) of said Act, 5 U.S.C., Section 1009(e):

> So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, . . . It shall . . . (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . (3) in excess of statutory jurisdiction, authority, or limitation, . . . (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8.

QUESTIONS PRESENTED

The Interstate Commerce Commission, acting on a complaint filed by the port of Corpus Christi, ordered equalization of rail rates on export cotton to Corpus Christi from origins in northern Texas, eastern New Mexico and Oklahoma with corresponding rates to Houston and Galveston,

although it found that Corpus Christi is from twenty to sixty percent farther from the origin territory than Houston-Galveston (App. 23). The District Court sustained the Commission's order, and the following questions are presented by this appeal:

1. Whether the Commission has authority to compel the railroads to establish equal rates to competing ports despite substantial differences in distance.

2. Whether it is arbitrary and without rational basis for the Commission to conclude that transportation conditions attending the movement of traffic from the origin territory to the ports involved are "substantially the same, although the distances are slightly more to Corpus Christi," when it has found that Corpus Christi is from twenty to sixty percent, or from 120 to 160 miles, farther from the origin territory than Houston-Galveston.

3. Whether the Commission disclosed the basis of its order with adequate clarity when it offered two inconsistent rationales in support of its conclusion, one based upon the premise that differences in distance are slight and one based upon the premise that the Commission has authority to compel rate equalization despite substantial differences in distance.

4. Whether mere citation by the Commission of other proceedings in which it has ordered rate equalization provides a rational basis for the Commission's order in this proceeding.

5. Whether the Commission is required by Section 8(b) of the Administrative Procedure Act to explain the reason for its departure from its prior ruling that the differences

in distance from origins involved here preclude an order requiring equalization of export cotton rates to Corpus Christi with those to Houston-Galveston.

6. Whether the District Court erred in holding that "prior equalization from these origins for other commodities is a relevant transportation condition."

7. Whether the District Court erred in sustaining the Commission's order on grounds not relied upon by the Commission.

8. Whether the District Court correctly construed its function as a reviewing court under Section 10(e) of the Administrative Procedure Act.

STATEMENT OF THE CASE

Acting upon a complaint filed by the port of Corpus Christi, Division 2 of the Interstate Commerce Commission found, by a majority of 2-1, that export cotton rates to Corpus Christi from northern Texas, eastern New Mexico and Oklahoma are unduly prejudicial under Section 3(1) of the Interstate Commerce Act [49 U.S.C. § 3(1)] insofar as they exceed corresponding rates to Houston-Galveston. The Commission ordered equalization of the rates. City of Galveston, et al., brought this action to set the Commission's order aside, and the railroad appellants intervened as parties plaintiff. The District Court sustained the Commission's order, and this appeal is taken from the District Court's judgment.

In its report, the Commission recognized that Corpus Christi is farther from the origin territory than Houston-Galveston, finding as follows (App. 21-23):

> The origin territory involved in this proceeding is over 800 miles wide, and where higher rates are maintained to Corpus Christi than to Houston and Galves-

> ton, the distance from each origin to Corpus Christi is longer than to the other two ports.
>
> • • •
>
> . . . the docket No. 28300 distance . . . to Corpus Christi exceeds those to Houston by from approximately 120 to 160 miles, or from 20 percent on the longer hauls to 60 percent on the shorter hauls.

Despite these significant differences in distance from the origin territory, the Commission found that it is unlawful under Section 3(1) for the railroads to maintain higher rates to Corpus Christi than to Houston-Galveston, and it ordered equalization.[1] The Commission seeks to rationalize its disregard of distance in three ways (App. 23):

> (1) In relating export rates, distance is an important factor; however, equal rates have been required to related ports even where there have been substantial differences in distances.
>
> (2) Such ranges in distances have existed in prior proceedings from substantially the same origins to the same Texas ports . . . and equal rates have been required. No different conclusion is warranted in the instant proceedings.
>
> (3) The assailed rates appear to exercise so drastic an influence as to require port equalization.

The Commission also makes a finding that the differences in distance are slight, which is inconsistent with its other rationalizations and which conflicts with its factual determinations (App. 23):

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[1] As shown in the appendix to the Commission's report (App. 26-27), the rates to Corpus Christi are higher in cents per hundred pounds than those to Houston-Galveston, but because of the longer distances, the rates to Corpus Christi are lower on a per-mile basis than those to Houston-Galveston.

Transportation conditions are substantially the same from points of origin, although the distances are slightly more to Corpus Christi.

THE QUESTIONS ARE SUBSTANTIAL

1. A significant question raised by this appeal is whether the Commission has authority under Section 3(1) of the Interstate Commerce Act to compel the railroads to establish equal rates to competing ports despite substantial differences in distance. The right of the railroads to take distance into account in establishing freight rates is of crucial importance not only to the railroads but to the shipping public as well. If the Commission has the power to vitiate this right and to compel equalization of rates to more distant ports, uneconomic and wasteful transportation service will be encouraged and the railroads' ability to maintain rates low enough to move goods economically in export commerce and low enough to meet unregulated competition will be substantially impaired.

In the present case, the Commission has made a finding that Corpus Christi is from twenty to sixty percent farther from the origin territory and has rationalized its order, in part, on the ground that equalization of rates to ports has been required even where there have been substantial differences in distance, citing *Hillsborough County Port Authority* v. *Ahnapee & W. Ry.*, 313 I.C.C. 691 (1961). Judicial interpretation of Section 3(1), however, denies the authority sought to be exercised by the Commission in this case. It has been consistently recognized by the courts that a disadvantage which comes to a person or locality as a result of location does not constitute a prejudice within the meaning of Section 3(1) and that the Commission is without authority to adjust freight rates for the purpose of neutralizing natural geographic disadvantages. *Interstate*

Commerce Commission v. *Diffenbaugh*, 222 U.S. 42, 46 (1911); *United States* v. *Illinois Central R. Co.*, 263 U.S. 515, 524 (1924); *Texas and Pacific R. Co.* v. *United States*, 289 U.S. 627, 629 (1933); *State of New York* v. *United States*, 331 U.S. 284, 331-332 (1947); *Alabama G. S. R. Co.* v. *United States*, 340 U.S. 216 (1951); *Baltimore & Ohio R. Co.* v. *United States*, 151 F. Supp. 258, 275 (1957), vacated on other grounds, *I.C.C.* v. *Baltimore & O. R. Co.*, 355 U.S. 175 (1957).[2]

The District Court acknowledges the validity of this construction of Section 3(1), but it seeks to introduce a qualification. It states that while mileage is important, other transportation conditions are to be considered in determining whether there is undue prejudice, implying that distance differences may be overridden by other factors (App. 7). The court cites *Boston & M. R.R.* v. *United States*, 202 F. Supp. 830 (1962), affirmed 373 U.S. 372; and *City of Wilmington* v. *Alabama, G. S. Ry.*, 316 I.C.C. 709, 724-725 (1962), as authority for this proposition. These cases are inapposite. They involved the lawfulness of voluntary equalization of rates to more distant ports by the railroads, and the question presented was whether equal rates for longer hauls would be prejudicial to the nearer ports. Consequently, these decisions do not stand for the proposition that the Commission may compel equalization of rates to more distant ports nor do they qualify the construction of Section 3(1) set forth in the *Diffenbaugh* and *Illinois Central* cases. In fact, the court in *Boston*

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[2] The Commission itself applied this principle in a recent case in which it cited the *Diffenbaugh* and *Illinois Central* cases for the proposition that it is "not empowered to remove disadvantages caused by natural environment." *Stanislaus County* v. *A.T.&S.F. Ry.*, 329 I.C.C. 40, 53-54 (1966).

& M. R.R. v. *United States* pointed out that there is a basic distinction between what the railroads may do voluntarily and what the Commission may compel them to do under Section 3(1), and the court set aside a Commission order which failed to observe this distinction. See 202 F. Supp. 830 at 837.[3]

The District Court essentially avoids the question of whether the Commission has authority to compel equalization of rates to more distant ports when it defines prejudice as a "practical consequence in the practical world of transportation" (App. 6).[4] Using this definition, the

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[3] The inapplicability of decisions involving voluntary equalization of more distant ports is drawn into sharp focus by analysis of the *Wilmington* case. There the Commission held that the railroads could voluntarily establish equalization, but only insofar as distances to the more distant port did not exceed those to the nearer ports by more than twenty-five percent. Thus, if the railroads here had sought to equalize Corpus Christi voluntarily, the Commission, under *Wilmington*, would have to find such equalization unduly prejudicial *to Houston-Galveston* from many of the origin points involved here. Consequently, the *Wilmington* case is not authority for a conclusion that the absence of equalization from these same origins is prejudicial *to Corpus Christi*. The anomaly results from the District Court's failure to recognize that while the railroads may, in some circumstances, voluntarily equalize more distant ports, the Commission is without authority to compel them to do so. Cf. *Boston & M. R.R.* v. *United States*, 202 F.Supp. 830 (1962). *New York Produce Exchange* v. *Baltimore & O. R. Co.*, 7 I.C.C. Rep. 612 (1898).

[4] The Court concludes that the Commission has "broad discretion" in determining the existence of undue prejudice (App. 9-10). The court fails to recognize, however, that the Commission has no discretion to exceed the limitations on its authority laid down by the Supreme Court in construing Section 3(1) in the *Diffenbaugh* and *Illinois Central* cases. Cf. *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965).

court concludes that prejudice is established "by uncontradicted testimony in the record" (App. 6). The testimony relied upon by the court, however, all relates to the question of whether Corpus Christi is deprived of traffic, i.e., is injured, by the rate structure. Thus, the District Court has failed to observe that the question of injury is separate from the question of whether there is any prejudicial treatment in the first instance. Cf. *Atchison, Topeka and Santa Fe Ry. Co.* v. *United States*, 218 F.Supp. 359, 363 (1963). The Commission also appears to have erroneously equated prejudice with injury when it stated that equalization is required because of the "drastic influence" of the rates (App. 23). The injury question, however, arises only after prejudicial treatment has been shown, and prejudicial treatment must be established with reference to relative transportation conditions. *United States* v. *Illinois Central R. Co.*, 263 U.S. 515, 524 (1924).

2. The Commission's lack of authority to use Section 3(1) as a means of neutralizing natural geographic disadvantages is a corollary of the rule that there is no undue prejudice unless relative transportation conditions are substantially similar. *Atchison, Topeka and Santa Fe Ry. Co.* v. *United States*, 218 F. Supp. 359, 363 (1963); *State Corp. Comm. of Kansas* v. *United States*, 185 F. Supp. 691, 698 (1959). The Commission, cognizant of this basic rule of law, found that "transportation conditions are substantially the same from points of origin, although the distances are slightly more to Corpus Christi" (App. 23). The District Court construed this finding as a clear statement that Corpus Christi's "disadvantage amounts to undue prejudice" (App. 8). This finding, however, is directly at odds with the Commission's analysis of the distance relationships showing that Corpus

Christi is from twenty to sixty percent, or from 120 to 160 miles, farther from the origin territory than Houston-Galveston (App. 23).[5]

We took the position before the District Court that it was arbitrary for the Commission to characterize distance differences of this magnitude as slight and that the Commission had no rational basis upon which to conclude, in the face of its own analysis of the distance relationships, that transportation conditions are substantially the same. Moreover, the Commission seems to have been clearly aware of the fact that the distance differences in this proceeding are material when it cited *Hillsborough County Port Authority* v. *Ahnapee & W. Ry.*, 313 I.C.C. 691 (1961), for the proposition that rate equalization may be required "even where there have been substantial differences in distances." In point of fact, the distance differences involved in that proceeding were somewhat less than those involved here, underscoring the arbitrary nature of the Commission's attempt to characterize comparable distance differences as slight in this proceeding and highlighting the lack of rational basis for the Commission's conclusion that transportation conditions are "substantially the same."[6] In *Morgan* v.

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[5] This analysis is based upon Docket No. 28300 mileages which were constructed by the Commission in another proceeding to establish properly related class rates. Docket No. 28300 class rates have often been used as a test for lawful rate relationships for specific commodities. See *Cudahy Packing Co.* v. *Akron C.& Y. R. Co.*, 318 I.C.C. 229, 245 (1962), affirmed *Atchison, Topeka and Santa Fe Ry. Co.* v. *United States*, 218 F. Supp. 359 (1963).

[6] In *Hillsborough County Port Authority* v. *Ahnapee & W. Ry.*, Tampa, the complaining port was, on the average, 1214 rail-miles from the origin territory. This was approximately 25% farther from that territory than the south Atlantic ports involved, 29% farther than west Gulf ports and 38% farther than east Gulf ports.

United States, 298 U.S. 468, 480 (1936), the Supreme Court held that for an administrative order to be valid there must be evidence adequate to support pertinent and necessary findings of fact. *A fortiori*, when the Commission's own analysis of the evidence contradicts a pertinent and necessary finding of fact, that finding is arbitrary and cannot constitute a rational basis for the Commission's order. Although this issue was raised below, the District Court failed to give any consideration to this elementary deficiency in the Commission's report.

3. The Commission's finding that distance differences are slight and transportation conditions substantially the same is inconsistent with the legal conclusion offered as a rationalization for its decision, i.e., that equalization may be required even where there are substantial differences in distance. This inconsistency raises considerable doubt as to the ultimate basis of the Commission's order, and the District Court has fallen prey to the resulting ambiguity. The court states that the finding that distance differences are slight and transportation conditions the same is a clear statement that "Corpus Christi's disadvantage amounts to undue prejudice" (App. 8). Yet, at the same time, the court reasons that distance is not a controlling factor and finds that the Commission's statement that equalization may be required even where differences in distance are substantial is a valid supporting finding (App. 9). These are logically and factually inconsistent bases of decision.

The District Court revealed the source of its logical difficulties as follows (App. 3-4):

> The I.C.C. findings under review here are sketchy and present this court with difficulties which more explicit findings would remove. The I.C.C. opinion is so imprecise in revealing just what findings it is making

that the order borders dangerously on running afoul of the requirement that agencies disclose the basis of their orders.

The inability of the District Court to decide whether the Commission's order was based upon a conclusion that distance differences are slight or upon an assumed discretion to require equal rates despite substantial distance differences demonstrates that the Commission's report lacks the requisite clarity and disclosure to be valid and that the District Court erred in not remanding the proceeding to the Commission on this ground. *Burlington Truck Lines v. United States*, 371 U.S. 156, 167-168 (1962); *Labor Board v. Metropolitan Ins. Co.*, 380 U.S. 438, 443 (1965).

4. The Commission sought to support its order by reference to three prior proceedings in which rates to Corpus Christi on grain and grain products were equalized with rates to other Gulf ports, including Houston and Galveston.[7] Although those proceedings involved different commodities and different port relationships (which give rise to different distance relationships) from those involved here, the Commission failed to explain why those proceedings are controlling on the specific facts of record in this proceeding. Instead, the Commission merely stated that "no different conclusion is warranted in the instant proceedings" (App. 23).

We took the position before the District Court that mere citation of prior proceedings does not constitute a sufficient articulation of the basis of the Commission's order in this

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[7] *Nueces County Navigation District No. 1 v. Abilene & Southern Ry.*, 291 I.C.C. 459 (1954); *Nueces County Navigation District No. 1 v. Atchison, T. & S.F. Ry. Co.*, 315 I.C.C. 155 (1961); *Export Grain from Texas to Texas Points*, 319 I.C.C. 16 (1963).

proceeding. *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 653-654 (1954); *Erie R. Co.* v. *United States*, 59 F. Supp. 748 (1944). This is particularly so when, as will appear below, the Commission gave no consideration in its report to a contrary ruling in a prior proceeding involving the same commodity, the same origins and the same port relationships as those involved here. See *Labor Board* v. *Metropolitan Ins. Co.*, 380 U.S. 438, 442-3 (1965).

The District Court's treatment of the Commission's reliance upon prior proceedings involving Corpus Christi is very ambiguous. The court seemingly agrees that mere reference to other proceedings cannot lawfully constitute a substitute for adequate findings based upon specific evidence of record when, referring to the proceedings relied upon by the Commission, it states in footnote 6 of its opinion (App. 8):

> These cases are cited because of their role as transportation conditions, and not as legal authority for the order under consideration . . .[8]

However, the District Court states subsequently (App. 9):

> The I.C.C. concluded that "no different conclusion is warranted in the instant proceedings." (325 I.C.C. 408). This court cannot say that this decision was without a rational basis.

Here the District Court seems to regard the Commission's mere citation of prior proceedings as providing a rational basis for the Commission's order in this case. However, the District Court does not and cannot state what specific findings in those cases rationally support the Commission's order on the particular facts of record in this proceeding.

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[8] This interesting definition of "transportation conditions" is discussed below.

Whether, in these circumstances, an unexplained application of *stare decisis* satisfies the requirements of Section 8(b) of the Administrative Procedure Act is a question of considerable public importance.

5. Directly at odds with the Commission's reliance on prior proceedings involving rates on other commodities is the absence of any mention in its report of *Nueces County Navigation Dist. No. 1* v. *Abilene & Southern Ry. Co.*, 155 I.C.C. 712 (1929), a prior proceeding involving rates on cotton from the same origins involved here which were alleged to be prejudicial to Corpus Christi and preferential of Houston-Galveston. Discussing the assailed rates from Texas and Oklahoma in terms of the respective distances to Corpus Christi and Houston, the Commission concluded:

> The distances to Houston range from 49 to 524 miles from the Texas points, and from 335 to 595 miles from the Oklahoma points. *The distances to Corpus Christi exceed those to Houston by an average of 130 miles from the Texas points, and 163 miles from the Oklahoma points.*
>
> The port of Corpus Christi is more remote from the heavy cotton producing sections than the other Texas ports, *its disadvantage in this respect being of such a substantial character as to preclude a requirement by us that it be neutralized by freight rate adjustment.* (155 I.C.C. at 716, emphasis supplied).

We took the position before the District Court that where the Commission enters an order directly contrary to a prior ruling, it is arbitrary for the Commission to fail to make specific findings indicating the reasoning by which it holds its prior ruling to be inapplicable. See *Dixie Highway Express* v. *United States*, 242 F. Supp. 1016, 1021 (1965), in which a three-judge court observed:

> The doctrine of *stare decisis* does not apply to decisions of administrative bodies, but consistency of

> administrative rulings is essential, for to adopt different standards for similar situations is to act arbitrarily.

See also *N.L.R.B.* v. *Mall*, 119 F.2d 700 (7th Cir. 1941).

The District Court rejected our argument in a curious fashion in footnote 8 of its opinion (App. 9):

> Nor is the decision precluded by the I.C.C.'s refusal to grant cotton equalization from these origins in 1929. Much has happened since then.

This, of course, completely avoids the issue. The question is not whether the Commission is bound by its prior decision. It is whether the Commission is required to make findings which explain the basis of its departure from a prior ruling.[9]

We recognize that inconsistency is not necessarily fatal to administrative action. However, as the facts of this case demonstrate, there are times when the basis of an inconsistency is a material question as to which findings are required by Section 8(b) of the Administrative Procedure Act. Here the Commission has held on the one hand that distance differences preclude equalization and on the other hand that the same distance differences may now be ignored. The Commission's failure to explain this direct departure from its prior ruling raises the question of whether it has modified its interpretation of Section 3(1) or whether there may be special factors involved in the

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[9] Moreover, the District Court's effort to take upon itself the burden of distinguishing the Commission's prior ruling falls surprisingly short of the mark. The factor which led the Commission to hold that it was precluded from equalizing Corpus Christi with Houston-Galveston from points in Texas and Oklahoma was the comparative distance relationships. While much has happened since 1929, this particular factor has not been affected by the passage of time.

present proceedings that were not involved in the prior proceeding. In an analogous case, the Supreme Court remanded a decision of the Commission on the basis of inadequate findings. *Secretary of Agriculture* v. *United States,* 347 U.S. 645 (1954). In *Labor Board* v. *Metropolitan Ins. Co.,* 380 U.S. 438, 442-3 (1965), the Supreme Court held that where an agency relies upon certain prior proceedings without articulating the reasons for their applicability and fails to distinguish other contrary proceedings, its order lacks the clarity required for judicial review. That is precisely the situation presented here.

6. The District Court, in apparent recognition of the fact that the mileage differences in this case are significant, states (App. 7):

> While mileage is important, the "transportation standard" includes other transportation conditions.

The court goes on to hold that "prior equalization of rates from these origins for other commodities is a relevant transportation condition" (App. 9).

This is a novel interpretation of the term "transportation condition." As used by the Supreme Court and the Commission itself, the term "transportation condition" relates to the circumstances and conditions attending the movement of the particular commodities at issue between the particular points involved. By concluding that equalization of rates on totally unrelated commodities with transportation characteristics of their own is a relevant factor to be considered in appraising the relative transportation conditions involved in the movement of cotton, the District Court has made a fundamental error in construing Section 3(1) and has advanced a new theory that would have far reaching effects upon the future administration of those provisions.

7. In adopting the novel view that equalization of rates on unrelated commodities is a "relevant transportation condition," the District Court has sought to sustain the Commission's order on grounds not relied upon by the Commission. As is clear on the face of its report, the Commission relied upon prior equalization of rates on other commodities as legal authority for its action, not as a "transportation condition." Consequently, the District Court's opinion is in conflict with *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947); *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168 (1962); and *Labor Board* v. *Metropolitan Ins. Co.*, 380 U.S. 438, 444 (1965).

The District Court also engaged in *post hoc* rationalization when it attempted unsuccessfully to distinguish *Nueces County Navigation District No. 1* v. *Abilene & Southern Ry.*, 155 I.C.C. 712, a decision not considered in the Commission's report. Another example of *post hoc* rationalization is found in the court's statement (App. 7-8):

> The Commission pointed out that the Corpus Christi and Houston-Galveston ports had been equalized for a number of years before the railroads voluntarily reduced their rates to Houston.

This information, contrary to the court's statement, does not appear in the Commission's report but was suggested in the Government's brief. Finally, the District Court accords weight to the fact that the railroads have voluntarily equalized Corpus Christi on some commodities (App. 8). Here again, this information does not appear anywhere in the Commission's report but was supplied by the defendants as a *post hoc* rationalization of the Commission's order.

9. We believe that the errors of the District Court can be traced to its belief that remanding the case to the Commission would accomplish nothing. After acknowledging the lack of clarity in the Commission's report, the court says (App. 4):

> No purpose would be accomplished by returning the case to the I.C.C. for further findings.

After stating that it could not support the order on new rationales advanced by the defendants (a rule which it disregarded), the District Court says (App. 5):

> However, plaintiffs have insisted that a remand to secure more precise findings would accomplish nothing. They maintain that the factual record is so deficient that no findings, however explicit, can support the order.

This is not a correct statement of the position of the railroad appellants. Our position was that if the District Court adopted our view that the Commission is without authority to compel rate equalization where there are substantial differences in distance, the Commission would be precluded from finding a violation of Section 3(1) on the evidence of record in this case. However, we also took the position that the Commission's order was arbitrary, without rational basis, deficient in findings and lacking in the requisite clarity to be valid. The District Court, rejecting our first argument, has neglected the other deficiencies in the Commission's report and has sustained the Commission's order on grounds not relied upon by the Commission. Section 10(e) of the Administrative Procedure Act requires a reviewing court to set aside administrative orders which are arbitrary, without rational basis, deficient in findings and lacking in the requisite clarity, and the fact that the court believes the same result would be reached by the Commission on remand does not relieve it of this obligation.

CONCLUSION.

For the reasons stated, the questions presented by this appeal are substantial and are of public importance. It is respectfully submitted that probable jurisdiction should be noted.

W. A. Thie,
Katy Building,
Dallas, Texas,

Don McDevitt,
139 West Van Buren,
Chicago, Illinois,

Sterling W. Steves,
200 Ft. Worth Club Bldg.,
Fort Worth, Texas,

Harvey Huston,
Milton E. Nelson, Jr.,
80 E. Jackson Blvd.,
Chicago, Illinois,
Attorneys for Railroad Appellants.

December 2, 1966

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CITY OF GALVESTON, ET AL., *Plaintiffs*, vs. UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants.*		Civil Action No. 65-H-594

Before BROWN, *Circuit Judge*, and HANNAY and INGRAHAM *District Judges.*

INGRAHAM, *District Judge:*

The ports of Houston and Galveston and four of the original twenty-six defendant railroads seek to set aside an order of the Interstate Commerce Commission entered in *Nueces County Navigation District No. 1* v. *Atchison, Topeka and Santa Fe Railway Company, et al.*, 325 I.C.C. 400 (1965). The order held that the export rates for cotton from specified origins in northern Texas, Oklahoma and New Mexico were unduly prejudicial to the port of Corpus Christi and unduly preferential to the ports of Houston and Galveston, in violation of Section 3(1) of the Interstate Commerce Act, 49 U.S.C.A., Section 3(1).[1]

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[1] Section 3(1) of the Interstate Commerce Act, 49 U.S.C.A., Section 3(1):

"It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port

This court concludes that the order is supported by substantial evidence, is consistent with Section 3(1), and meets the requirements of the Administrative Procedure Act, 5 U.S.C.A., Section 1001, *et seq.* This court enforces the order by denying relief and dismissing the cause on its merits.

This court properly performs only a very limited role in reviewing a decision of an administrative body such as the ICC. Once a rational basis for the conclusions of an administrative body is found, the judicial function is ended. *Mississippi Valley Barge Line Co. v. United States,* 292 U.S. 282, 286-7 (1934). Courts are not empowered to weigh the wisdom of a particular decision:

> "It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law." *United States* v. *Pierce Auto Freight Lines, Inc.,* 327 U.S. 515, 536 (1946).

Courts have long recognized the application of this principle to discriminatory rail rate situations and pointed to the particular considerations which support the rule in this area. Whether a discrimination or preference is undue, unreasonable and unjust is a determination for the

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district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . ."

ICC to make. *Nashville, C. & St. L. Ry.* v. *Tennessee,* 262 U.S. 318, 322 (1923). A court "has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it." *Virginian Ry.* v. *United States,* 272 U.S. 658, 665-6 (1926). Congress has constituted the ICC as the expert body which is informed by experience to determine whether undue discriminations exist in rail rates.

> "The complexities and involvements of railroad rates are not to be shifted from the shoulders of the experts commissioned to handle them to the backs of the judiciary; nor are the broad powers of judgment conferred upon the experts to be unduly hampered." *Koppers Company, Inc.* v. *United States,* 166 F.Supp. 96, 103 (W.D. Pa. 1958).

This court must determine whether the Commission has followed correct legal procedures and principles, but beyond that this court is permitted no greater role than ascertaining whether there exists a rational basis for the ICC order.

> " . . . We would depart from our competence and our limited function in their field if we undertook to accommodate the factors of transportation conditions, distance and competition differently than the Commission has done in this case. This is a task peculiarly for it." *Ayrshire Collieries Corp.* v. *United States,* 335 U.S. 573, 593 (1949).

The ICC findings under review here are sketchy and present this court with difficulties which more explicit findings would remove. The ICC opinion is so imprecise in revealing just what findings it is making that the order

borders dangerously on running afoul of the requirement that agencies disclose the basis of their orders.[2]

However, this court concludes that the findings are adequate under Section 8(b) of the Administrative Procedure Act, 5 U.S.C.A., Section 1007(b). No purpose would be accomplished by returning the case to the ICC for further findings.

The ICC decision here must be tested on the basis of what it contains, and not on any new ideas offered to support it. The United States, the ICC, and the defendant intervenors have offered new rationales for the ICC order, but whatever their merits, such suggestions could only call for remand to the agency for consideration. *S. E. C.* v. *Chenery Corp.*, 318 U.S. 80, 94-5 (1943).

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[2] "Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion.' *New York* v. *United States*, 342 U.S. 882, 884 (dissenting opinion). 'Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body.' *Federal Communications Com.* v. *RCA Communications, Inc.*, 346 U.S. 86, 90. The Commission must exercise its discretion under Sec. 207(a) within the bounds expressed by the standard of 'public convenience and necessity.' Compare id. 346 U.S. at 91. And for the courts to determine whether the agency has done so, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197. The agency must make findings that support its decision, and those findings must be supported by substantial evidence. *Interstate Commerce Com.* v. *J-T Transport Co.*, 368 U.S. 81, 93; *United States* v. *Carolina Carriers Corp.*, 315 U.S. 475, 488, 489; *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U.S. 499, 511." *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 167-8 (1962).

However, plaintiffs have repeatedly insisted that a remand to secure more precise findings would accomplish nothing. They maintain that the factual record is so deficient that no findings, however explicit, can support the order.

This court deems that the ICC was aware of what it was doing and intended the result it achieved. It did not purpose to go outside traditional guidelines or to establish new precedents designed to advance the equalization of all ports. New or improved findings would not serve to articulate the process of decision and expose the factual weaknesses.

The order stands or falls on the sufficiency of the findings made and the evidence to support them.

Before the ICC can equalize rates, there must be an adequate factual showing of (a) prejudice, and (b) prejudice which is undue resulting from a rate disparity or "misalignment of rates". *Atchison, T. & S. F. Ry.* v. *United States*, 218 F.Supp. 359, 363 (N.D. Ill., 1963). Plaintiffs assert that to make an initial showing of prejudice, rates to the more distant port must be shown to be higher *relative mileage considered* than those to the nearer port. If the rates *per mile* are not higher to the more distant port, plaintiffs claim that there is no showing of prejudice.[3]

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[3] Plaintiffs' claim is based on general language found in two ICC decisions:

> "However, the respondents have shown that the proposed rates are reasonably graded according to shortline distances, and since their proposal would allow the protestants rates which are *relatively no higher* than those afforded other shippers in the area, no basis exists for a finding of prejudice which is undue." (Emphasis supplied). *Grain from Groups I & J Origins to Pacific Coast*, 299 ICC 129, 134 (1956).

This court squarely rejects this mechanical definition of prejudice. Prejudice is a practical consequence in the practical world of transportation. That Corpus Christi is prejudiced is established by uncontradicted testimony in the record. Corpus Christi has ample shipping facilities and liner services. It is geographically and frequently by highway distances closer to this cotton origin territory than Houston-Galveston, yet Corpus Christi cannot get a single bale of cotton by rail for export.[4] Corpus Christi now gets practically no cotton from these origins by truck.[5] This result is a direct consequence of the rail rate structure. Shippers decline to ship cotton to Corpus Christi simply because it costs about 25¢ per bale more than does shipping to Houston-Galveston. Per mile or "distance considered" rates do not figure in their calculations.

". . . it is difficult to understand how undue prejudice under section 3 can be present where rates are made on precisely the same level, mile for mile, from all competitive producing points to common destinations." *Paper from the South and Southwest*, 218 ICC 202, 216 (1936).

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[4] Since the issue is prejudice regarding cotton from these origins, the fact that Corpus Christi does get cotton from the Rio Grande Valley area of Texas has no bearing other than to demonstrate that Corpus Christi is a cotton port and can claim a right to compete for cotton from the origins in this case.

[5] Under a "truck allowance system" instituted by the railroads, rail rates are now lower to Houston-Galveston than the truck rates to Corpus Christi. However, on February 23, 1966, Division 2 of the ICC found the allowance system to be unlawful. *Allowances for Trucking Baled Cotton, Ark., Okla., Tex.*, 326 ICC 335 (1966).

If this result flows from the natural advantage and location of Houston-Galveston and the natural disadvantage of Corpus Christi in relation to them, then the ICC lacks authority to equalize the rail rates. "The law does not attempt to equalize fortune, opportunities, or abilities." *I.C.C.* v. *Diffenbaugh,* 222 U.S. 42, 46 (1911). " . . . the natural advantage which belongs to a locality does not constitute a preference." *Baltimore & O. R.R.* v. *United States,* 151 F.Supp. 258, 275 (D.Md., 1957).

However, there is more to natural advantage and location than geographic mileage differences, and shorter mileage to one port does not automatically give immunity from rate equalization.

> "It is true that the law does not attempt to equalize opportunities among localities (*Interstate Commerce Commission* v. *Diffenbaugh,* 222 U.S. 42, 46) and that the advantage which comes to a shipper merely as a result of the position of his plant does not constitute an illegal preference. . . . To bring a difference in rates within the prohibition of Sec. 3, it must be shown that the discrimination practiced is unjust when measured by the transportation standard. In other words, the difference in rates cannot be held illegal, unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions." *United States* v. *Illinois Central Ry.,* 263 U.S. 515, 524 (1924).

While mileage is important, the "transportation standard" includes other transportation conditions. *Boston & M. R.R.* v. *United States,* 202 F.Supp. 830 (D.Mass., 1962), aff'd 373 U.S. 372 (1963), 374 U.S. 859 (1963); *Atchison, T. & S. F. Ry.* v. *United States,* 231 F.Supp. 422, 430 (N.D. Ill., 1964); *City of Wilmington* v. *Alabama G. S. Ry.,* 316 ICC 709, 724-5 (1962). The Commission pointed out that the Corpus Christi and Houston-Galveston ports had been

equalized on cotton for a number of years before the railroads voluntarily reduced their rates to Houston. Rail rates for certain other commodities from these origins and others are equalized between the ports, some voluntarily and some by order of the ICC.[6] The ICC found that "The general terrain of the territory over which the defendants operate is the same whether the traffic moves to Corpus Christi or Houston-Galveston." (325 ICC 406). The ICC conclusion that Corpus Christi's disadvantage amounts to undue prejudice was clearly stated: "Transportation conditions are substantially the same from points of origin, although the distances are slightly more to Corpus Christi." (325 ICC 408).

The question of mileage is not a simple one, as the ICC emphasized. The examiner preferred percentage comparisons of short-line distances from 19 selected origins which gave an average difference of 14%. The Corpus Christi interest urged a weighted average which produced smaller variations.[7] The ICC considered the docket No. 28300 distances urged by Galveston interests which showed variations of 120 to 160 miles, or 20% on longer hauls and

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[6] These cases are cited because of their role as transportation conditions, and not as legal authority for the order under consideration: *Export Grain from Texas to Texas Points,* 319 ICC 16 (1963); *Nueces County Nav. Dist. No. 1* v. *Atchison, T. & S. F. Ry.,* 315 ICC 155 (1961); *Nueces County Nav. Dist. No. 1* v. *Abilene & S. Ry.,* 291 ICC 459 (1954).

[7]

Origin	*Galveston*	*Corpus Christi*	*Difference*
New Mexico	796	811	15
Oklahoma	516	613	97
Texas	581	648	67

Houston is 45 miles closer to these origins than Galveston.

60% on shorter hauls. The ICC did not reject the other standards, but emphasized docket No. 28300 distances to give consideration to the greatest mileage differences presented. Using these computations which showed the greatest mileage variations, the ICC made two findings:

> (1) "In relating export rates, distance is an important factor; however, equal rates have been required to related ports even where there have been substantial differences in distances." (325 ICC 408).
>
> (2) "Such ranges in distance have existed in prior proceedings from substantially the same origins to the same Texas ports . . . and equal rates have been required." (325 ICC 408).

The short-line route from Lubbock, Texas, the center of the heavy cotton production area, to Corpus Christi is 67 miles farther than to Galveston, which in turn is 45 miles farther than Houston. The railroads have already equalized Galveston and Houston, so the required equalization here is an additional 22 mile difference on a 646 mile haul.

The prior equalization of rates from these origins for other commodities is a relevant transportation condition. The ICC concluded that "no different conclusion is warranted in the instant proceedings." (325 ICC 408). This court cannot say that this decision was without a rational basis.[8]

Considering the record and findings as a whole, this court concludes that the ICC gave due consideration to the distance factor, and that its ultimate conclusion was well within its "broad discretion . . . to accommodate the

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[8] Nor is the decision precluded by the ICC's refusal to grant cotton equalization from these origins in 1929. Much has happened since then. *Nueces County Nav. Dist.* v. *Abilene & S. F. Ry.*, 155 ICC 712 (1929).

factors of transportation conditions, distance and competition." *Ayrshire Collieries Corp.* v. *United States, supra,* at 593.

It is therefore the opinion of this court that the ICC order should be enforced and the complaints dismissed.

Done at Houston, Texas, on this, the 11th day of August. A.D. 1966.

(sgd) *John R. Brown*
United States Circuit Judge

(sgd) *Allen B. Hannay*
United States District Judge

(sgd) *Joe Ingraham*
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CITY OF GALVESTON, ET AL., *Plaintiffs*, vs. UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants.*	Civil Action No. 65-H-594

JUDGMENT

I. For the reasons set out in the court's opinion of this date, it is

ORDERED, ADJUDGED AND DECREED

that the order of the Interstate Commerce Commission served on May 19, 1965, in the case of *Nueces County Navigation District No. 1* v. *Atchison, Topeka, and Santa Fe Railway Company, et al.*, 325 I.C.C. 400, be enforced and that the complaints of plaintiffs in this action be dismissed.

II. However, this court further believes that the temporary restraining order entered by this court on October 1, 1965 (as authorized by 28 U.S.C.A., Section 2324) should be extended through the disposition of appeal of this decision. Rule 62(c), Federal Rules of Civil Procedure; *Merchants' Warehouse Co.* v. *United States*, 283 U.S. 501 (1931). Implementation of the ICC order will require the cost of compiling, printing, and mailing new tariffs and will result in a loss of business to the plaintiff railroads

whose lines do not reach Corpus Christi. This court, viewing all the circumstances presented, believes that the changes required by the ICC order and the resulting irreparable damage to plaintiffs should not be instituted until the legality of the order is finally determined by the Supreme Court. Congress has provided an appeal of right to the Supreme Court from this court's decision. 28 U.S.C.A., Section 1253. Should no appeal be taken, the restraining order will cease.

Therefore, this judgment is stayed and shall not take effect until any appeal taken to the Supreme Court is finally determined, or, in the event no appeal is taken, this stay shall cease and this judgment shall become effective sixty days after this date.

Done at Houston, Texas, on this, the 11th day of August, A.D. 1966.

(sgd) *John R. Brown*
United States Circuit Judge

(sgd) *Allen B. Hannay*
United States District Judge

(sgd) *Joe Ingraham*
United States District Judge

APPENDIX C

Served May 19, 1965

30266

INTERSTATE COMMERCE COMMISSION

No. 34409[1]

NUECES COUNTY NAVIGATION DISTRICT NO. 1 v. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

Decided May 7, 1965

Assailed export rates on cotton, in carloads, from certain points in Oklahoma, New Mexico, and Texas to Corpus Christi, Tex., found to be unduly prejudicial to Corpus Christi and unduly preferential of other Texas ports. Undue preference and prejudice ordered removed.

J. F. Jamison, Jr., Frank A. Leffingwell, and *Robert B. Reedy* for complainants.

Charles W. Bucy, Elmo F. Clark, Joseph E. Quin, and *Clarence H. Williams* for the Secretary of Agriculture of the United States.

M. P. Hamby for intervener in support of complainants.

Edwin N. Bell, John P. Ganly, Harvey Houston, Y. E. Juge, Don McDevitt, Milton E. Nelson, Jr., Sterling W. Steves, Thomas A. Stoery, and *William A. Thie* for defendants.

J. W. Boehl, L. F. Daspit, W. E. Fincher, E. B. McKinney, Carl S. Parker, Jr., and *Louis A. Schwartz* for interveners in support of defendants.

[1] This report embraces also No. 34409 (Sub-No. 1), Gulf Compress v. Atchison, Topeka & Santa Fe Railway Company et al.

REPORT AND ORDER OF THE COMMISSION

DIVISION 2, COMMISSIONERS FREAS, GOFF, AND TIERNEY

GOFF, *Commissioner:*

These proceedings present related issues, were heard on a consolidated record, and will be disposed of in one report. Exceptions to the recommended report and order of the examiner, and replies thereto, were filed by the parties and certain of the interveners. Our conclusions differ, in part, from those recommended. Exceptions and requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

In the title proceeding, by complaint filed on March 12, 1964, the complainant, a political subdivision of the State of Texas which owns and operates port terminal facilities at Corpus Christi, Nueces County, Tex., alleges that the carload rates[2] maintained by the defendants[3] on export cotton from points in Texas on and north of the line of the Texas and Pacific Railway Company between El Paso, Tex., and Shreveport, La., from points in New Mexico on and east of a line of the Santa Fe railway system between El Paso and Trinidad, Colo., and from points in Oklahoma, to the port

[2] Rates and differences in rates are stated per 100 pounds.

[3] The Atchison, Topeka and Santa Fe Railway Company; Beaver, Meade and Englewood Railroad Company; The Colorado and Southern Railway Company; Fort Worth and Denver Railway Company; Gulf, Colorado and Santa Fe Railway Company; Gulf, Mobile and Ohio Railroad Company; Illinois Central Railroad Company; The Kansas City Southern Railway Company; Kansas, Oklahoma & Gulf Railway Company; The Louisiana and North West Railroad Company; Louisiana Midland Railway Company; Midland Valley Railroad Company; Missouri-Kansas-Texas Railroad Company; Missouri Pacific Railroad Company; Oklahoma City-Ada-Atoka Railway Company; Panhandle and Santa Fe Railway Company; Quanah, Acme & Pacific Railway Company; St. Louis-San Francisco Railway Company; St. Louis Southwestern Railway Company; Southern Pacific Company; The Texas Mexican Railway Company; The Pecos Valley Southern Railway Company; Roscoe, Snyder and Pacific Railway Company; The Texas and Pacific Railway Company; and Texas-New Mexico Railway Company.

of Corpus Christi are unjust and unreasonable in violation of section 1 of the Interstate Commerce Act, and are unduly prejudicial to the port of Corpus Christi and unduly preferential of the ports of Galveston and Houston, Tex., and New Orleans, La., in violation of section 3(1) of the act. In No. 34409 (Sub-No. 1), a complaint was filed on March 23, 1964, by the Plains Cotton Cooperative Association, a cooperative cotton marketing association with headquarters at Lubbock, Tex.,[4] and the Gulf Compress, a cooperative corporation with a cotton compress and warehouse facility at Corpus Christi, alleging that the carload rates maintained by defendants[5] on cotton for export from the above-described origin territory to Corpus Christi are unjust and unreasonable, and unduly prejudicial to them and unduly preferential of competitors and other western gulf ports, including Houston and Galveston, and in some instances New Orleans. We are asked to issue a cease and desist order and to prescribe just, reasonable, and otherwise lawful rates, rules, regulations, and charges for the future.

The Secretary of Agriculture of the United States, the Brownsville Navigation District of Cameron County, Tex., and the Lubbock Cotton Exchange intervened in support of the complainants, and the board of trustees of the Galveston Wharves, the Galveston Cotton Exchange and Board of Trade, The New Orleans Traffic and Transportation Bureau, and the Houston Port Bureau, Inc., intervened in support of the defendants.

The complainants seek rates and related provisions on export shipments of cotton from the considered origins to

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[4] By order dated May 1, 1964, the Plains Cotton Cooperative Association was dismissed as party complainant, and this proceeding was then entitled Gulf Compress v. The Atchison, Topeka and Santa Fe Railway Company, et al.

[5] The defendants are listed in footnote 3 and, in addition, Hollis & Eastern Railroad Company.

Corpus Christi, the same as are maintained by the defendants on similar traffic to other western gulf ports, principally Houston, Galveston, and New Orleans. The ocean rates from Galveston, Houston, and Corpus Christi are the same. After the evidence was submitted, four of the defendants, namely, the Pecos Valley Southern, the Roscoe, Snyder & Pacific, the Texas-New Mexico, and the Texas & Pacific, reduced their rates from Fort Worth, Tex., and origins west thereof which are involved herein, on traffic exported through Corpus Christi, to not exceed those on corresponding traffic exported through Galveston, Houston, and New Orleans. In consideration of a motion filed in behalf of the complainants, those four carriers were dismissed as party defendants by order dated September 11, 1964. Also, effective October 28, 1964, many of the assailed rates were revised so that they now are 5 cents higher to Corpus Christi than the corresponding rates to Houston and Galveston. Representative rates from points in the involved origin territory are shown in the appendix attached hereto.

The port of Corpus Christi has 500,000 square feet of sheds at shipside available for handling export shipments of cotton, and there are about 25 miles of railroad track in the port area. This port is served by the Southern Pacific, the Missouri Pacific, and the Texas Mexican, and by about 157 steamship lines. About 42 of the latter carry cotton in regularly scheduled service. In 1962, there were 1,200 deep sea sailing departures registered from this port.

The origin area involved in these proceedings is the source of approximately 25 percent of all the cotton produced within the United States. The 2-year average production, 1962-63, was as follows:

Northern Texas	3,123,753	bales.
Oklahoma	278,858	bales.
Eastern New Mexico	199,430	bales.
Total	3,602,041	bales.

The production in northern Texas is about 80 percent of the State's total, more than 50 percent of the latter being grown in the 10 counties of which Lubbock is the hub.

For the last 5 or 6 years, the ports of Galveston and Houston, respectively, had average yearly receipts of cotton of 1,990,469 and 1,393,679 bales, of which 1,491,220 and 909,396 bales were exported. At the port of Corpus Christi during the last 4 years, the average yearly export of cotton was 366,995 bales, of which an average of 110,944 bales came from the origin area described herein. Of the total unmanufactured cotton exported from these ports, Galveston, Corpus Christi, and Houston, respectively, handled 58, 9, and 33 percent in 1960, 56, 12, and 32 percent in 1962, and (based on incomplete figures) 49, 17, and 34 percent in 1963. During the last 4 years, the average amount exported from each port was 1,719,239, 366,995, and 1,019,929 bales which amounted to 55.4, 11.8, and 32.8 percent of the total. Gulf Compress receives and handles cotton at Corpus Christi. It has about 35 acres of floorspace and can store approximately 220,000 bales of flat cotton at one time. It is located about 2 miles from the docks, and it drays cotton to the public wharves. During the last five seasons, Gulf Compress had total receipts of cotton, as follows:

Season	From complaint area	From other origins
	Bales	
1959-60	16,742	191,865
1960-61	113,411	197,910
1961-62	65,529	203,673
1962-63	152,596	203,480
1963-64	44,438	166,913
Total	392,716	963,841

Of the tonnage originating in the complaint area 7,944 bales moved via rail in 1959, 4,750 bales moved via rail in 1960, and 4,875 bales moved via rail in 1961. Since that time all movements from the complaint area have been by truck.

The rates on cotton reflect an intrastate scale extended to interstate commerce, as adjusted under the general increase proceedings and to meet motor carrier competition. The defendants contend that the motor carrier competition is not as intense at Corpus Christi as at Houston and Galveston. However, during the last 4 years, an average of over 100,000 bales of cotton from the origin area involved herein were exported through Corpus Christi, and during the last 2 years all of this cotton moved by truck. The evidence does not show how much cotton moved from the involved origin area by rail or truck to Galveston and Houston, but the average receipts during the last four seasons from all origins to Galveston and Houston were as follows:

	Galveston	Houston
By truck (bales)	445,911	268,709
By rail (bales)	1,471,292	964,858
Percent by truck	30.3	27.8

From the Fort Worth and Denver Railway origins in Texas, some of the major rail and motor movements in 1963, in bales, were as follows:

From	To — Houston		Galveston		Corpus Christi	
	Rail	Truck	Rail	Truck	Rail	Truck
Memphis	17,861	4,663	39,666	9,965	0	2,543
Plainview	18,765	2,443	40,865	21,148	0	12,127
Childress	3,411	411	23,974	1,665	0	0
Lubbock	77,057	8,611	48,875	51,594	0	90,949

There is motor carrier competition for the cotton traffic from origins in the considered area to Corpus Christi. It is not possible on this record to compare the intensity of such competition with that at Houston and Galveston, since the record does not show the entire motor carrier movement from the considered area to the latter two ports. The matter of relative intensity of motor carrier competition was considered in *Export Grain from Texas to Texas Points*, 319 I.C.C. 16, in which, at page 25, the following was quoted with approval from *Fargo Chamber of Commerce* v. *Akron, C. & Y. R. Co.*, 306 I.C.C. 407, 412:

Even if it is true, as alleged by the defendants, that there is less motor-carrier competition at Fargo than at the Twin Cities, the difference is in degree and does not afford justification for the maintenance of the prejudicial relation. See *Fargo Chamber of Commerce v. Ahnapee & W. Ry. Co.*, 300 I.C.C. 289.

The railroads have inaugurated a so-called truck allowance system[6] in connection with substituted truck service, which has the effect of reducing the rail rates in effect prior to September 17, 1963, by an average of 10 cents. The allowance has had the effect of attracting to rails the traffic which has been moving to Corpus Christi by truck, and since the rail rates to Galveston and Houston are lower, the rail shipments would tend to move to those ports rather than to Corpus Christi. We agree with the examiner that Corpus Christi cannot hope to grow in those circumstances.

The defendants which do not serve Corpus Christi directly, participate in joint rates and routes to that port, but refuse to establish the same rates thereto as to Houston and Galveston. They fear that some of their traffic may be diverted from the ports which they serve, and on such traffic they would receive only a division of the through rates. If equal rates are required at the three Texas ports, these defendants will consider this factor before they establish motor competitive rates at the ports they serve. The ports of Galveston and Houston have adequate facilities to handle this cotton traffic and fear that if equal rates are established, some of their cotton traffic will be diverted to Corpus Christi. However, as stated in *Nueces County Nav. District No. 1 v. Abilene & S. Ry. Co.*, 291 I.C.C. 459, at page 467, neither possible or probable diversion of traffic from, nor the adequacy of existing facilities at, ports presently

[6] Under investigation in I. and S. Docket No. 8008, Allowances for Trucking Baled Cotton, Ark., Okla., Texas, embracing also I. and S. Docket No. 8008 (Sub-No. 1), Allowances for Trucking Baled Cotton, Kans., N. Mex., Okla., Tex.; Docket Nos. 34326, Trucking Allowances on Baled Cotton, Ark., Okla., Texas; 34326 (Sub-No. 1), Substituted Truck Service Allowance on Cotton, Okla. & Texas; and 34326 (Sub-No. 2), Allowances for Trucking Cotton, Kans., N. Mex., Okla., and Texas.

handling the traffic are valid reasons for denying another port an opportunity to share in the business if it can induce shippers to use its facilities.

The examiner found that no evidence had been offered tending to show that the assailed rates exceed a reasonable maximum level. Complainants excepted to this conclusion. As complainants point out, there was a comparison made of the assailed rates with the lower export rates to the other ports. However, these compared rates were voluntarily established, have been in effect for some time, and are admittedly compensatory. The compared rates, as previously noted, are on a motor competitive level. Thus, they are not a proper yardstick to determine maximum reasonableness. *Keokuk Electro-Metals Co.* v. *Chicago & N.W. Ry. Co.*, 301 I.C.C. 55-57. We agree with the examiner that the evidence in this proceeding will not support a finding that the assailed rates exceed a just and reasonable level.

In connection with the complainants' allegation of undue preference and prejudice, as stated, they have included the port of New Orleans. The examiner concluded that New Orleans is not competitive with Corpus Christi for the considered export cotton traffic. The complainants urge on exceptions that since New Orleans has the same rates as Corpus Christi from some of the origins, and since shipments do move to New Orleans, the examiner's finding was in error. The evidence of movement referred to in the exceptions covers one shipment trucked to New Orleans just before a maritime strike, because there was not enough time to bring the shipment to Corpus Christi. We agree with the examiner that such evidence does not establish that the port of New Orleans is competitive with Corpus Christi for the considered cotton traffic.

Corpus Christi cannot expect to attract the rail movements of export cotton from the considered origins with higher rates than Galveston and Houston. The question is whether Corpus Christi's disadvantage amounts to un-

due prejudice, or, in other words, whether the higher rates to Corpus Christi and the lower rates to Houston and Galveston apply under substantially similar transportation circumstances. As previously noted, there is motor carrier competition on traffic to Corpus Christi. The general terrain of the territory over which the defendants operate is the same whether the traffic moves to Corpus Christi or Houston-Galveston. The existence of special facts justifying an inequity of treatment is a matter of defense to be proven by satisfactory evidence. See *Cudahy Packing Co.* v. *Akron C. & Y. R. Co.*, 318 I.C.C. 229, 245, affirmed *sub nom, Atchison, T. & S. F. Ry. Co.* v. *United States*, 218 F. Supp. 359.

The defendants refer to slower service from the considered origins to Corpus Christi than to Houston-Galveston. From Lubbock, for instance, the Atchison, Topeka & Santa Fe has single-line service to Houston and Galveston and offers second morning delivery, whereas to Corpus Christi it must interchange with another railroad, and the schedule calls for third morning delivery. Furthermore, the destination carriers at Corpus Christi divert a large percentage of the empty cars instead of returning them. These practices of the defendants, of themselves, however, do not warrant a rate inequity at the ports.

The origin territory involved in this proceeding is over 800 miles wide, and where higher rates are maintained to Corpus Christi than to Houston and Galveston, the distance from each origin to Corpus Christi is longer than to the other two ports. The examiner concluded that the best measure of the overall difference in the distances was a percentage comparison of the short-line rail distances from 19 selected origins[7] in the principal production area, which he considered to be representative, to Galveston and Corpus Christi. He computed those average distances to be 557.7 miles to Galveston and 636.2 miles to Corpus Christi, the latter being 14 percent longer. All of the parties filing

[7] Roswell and Lovington, N. Mex., and El Paso, Gainesville, Hamlin, Lamesa, Lubbock, Plainview, Seagraves, Sudan, Sweetwater, Childress, Chillicothe, Clarendon, Wichita Falls, Stanford, Abilene, Midland, and Pecos, Tex.

exceptions object either to the conclusion or to the selection of representative points. The complainants urge that the differences in distance be measured by the use of average distances from the origin counties in which the cotton was ginned, weighted to reflect the average number of bales ginned in such county, while the defendants argue that the distances over present tariff routes should be used. The Houston port interests support the use of the short-line distances from all points, and the Galveston port interests, the docket No. 28300[8] distances from the county seats. The average weighted distances from origins in New Mexico, Oklahoma, and Texas, respectively, are 796, 516, and 581 miles to Galveston, and 811, 613, and 648 miles to Corpus Christi. Other distances from representative points in Texas are shown in the following table:

		To—	
From—	Houston, Tex.	Galveston, Tex.	Corpus Christi, Tex.
	Miles	Miles	Miles
Childress	(1) 479.6	528	629
	(2) 480	480	622
	(3) 501.5	553.7	658.1 to 741.7
Lubbock	(1) 533.7	579	646
	(2) 525	525	646
	(4) 574	579	699.6 to 704.6
Plainview	(1) 580.5	626	693
	(2) 572	572	693
	(4) 621	626	746.6 to 751.6
Wichita Falls ..	(1) 373.4	422	523
	(2) 374	374	515
	(3) 395.3	447.5	551.9 to 635.7

(1) Short-line distances.

(2) Docket No. 28300 distances.

(3) Fort Worth and Denver Railway direct to Houston and Galveston, and in connection with other carriers to Corpus Christi.

(4) Santa Fe lines direct to Houston and Galveston, and in connection with other lines to Corpus Christi.

[8] *Class Rates Investigation, 1939*, 262 I.C.C. 447, and supplemental reports.

We have used distances on different bases as determinative of particular issues, depending upon the evidence presented and the intended use of the distances. In relating export rates, distance is an important factor; however, equal rates have been required to related ports even where there have been substantial differences in distances. See *Hillsborough County Port Authority* v. *Ahnapee & W. Ry.*, 313 I.C.C. 691, affirmed *per curiam, sub nom, Alabama, T. & N. R. Co.* v. *United States,* 207 F. Supp. 638. In the instant proceedings, the docket No. 28300 distances, as noted in the above table, are about the same as the short-line distances from the various origins to Houston and Corpus Christi, and they are about 48 miles less than the short-line distance to Galveston. Omitting the origins in southeastern Oklahoma and northeastern Texas, hereinafter considered, the docket No. 28300 distances from the other origins from which different rates are still maintained to Corpus Christi exceed those to Houston by from approximately 120 to 160 miles, or from 20 percent on the longer hauls to 60 percent on the shorter hauls. Such ranges in distances have existed in prior proceedings from substantially the same origins to the same Texas ports, *Export Grain from Texas to Texas Points, supra, Nueces County Nav. Dist. No. 1* v. *Atchison, T. & S. F. Ry. Co.*, 315 I.C.C. 155, and *Nueces County Nav. District No. 1* v. *Abilene & S. Ry. Co., supra,* and equal rates have been required. No different conclusion is warranted in the instant proceedings. Transportation conditions are substantially the same from points of origin, although the distances are slightly more to Corpus Christi. The assailed rates appear to exercise so drastic an influence as to require port equalization.

The examiner found that the rates assailed are unduly prejudicial to the port of Corpus Christi and unduly preferential of Galveston and Houston, as in the proceedings cited next above. However, as noted, the complaints have been dismissed as to the Texas & Pacific and three other railroads upon the request of the complainants, although such railroads did not equalize their rates from stations

east of Fort Worth to Corpus Christi with those to Houston and Galveston. Dallas, Denton, and Marshall, Tex., are in this group, and, as noted in the appendix, the rates are higher to Corpus Christi than to the other two ports. The complainants have indicated that the action of the Texas & Pacific satisfied the complaints. Numerous origins on the Texas & Pacific east of Fort Worth are also served by other defendants, and no reason appears for requiring the other defendants to establish equal rates from these points to the three Texas ports. Moreover, the principal production of cotton in Oklahoma is shown to be in the western part, only two counties, Bryan (Durant, Okla.) and Muskogee, having any substantial production in the eastern part. Bryan County is a part of the same production area as the Texas origins east of Fort Worth, and should be treated the same ratewise. Traffic from Muskogee County to Corpus Christi could be transported through the eastern Texas and Bryan County production area, and rates to Corpus Christi on the Houston-Galveston level could cause higher rates to intermediate than to more distant points over the same line or route. Thus, the defendants will be expected to grade their rates to avoid violating the fourth-section principles.

The examiner found that the transit arrangements in connection with the assailed rates are less favorable to Corpus Christi than to Galveston and Houston, and that Corpus Christi was therefore unduly prejudiced in that respect also. However, the evidence indicates that there is now substantial equality in the transit services permitted on export cotton over existing routes to the gulf ports. The existing arrangements should be continued in connection with the rates required herein.

We find that the assailed rates on export cotton from origins in New Mexico on and east of the line of the Santa Fe Railway system extending from El Paso, Tex., to Trinidad, Colo., those in Texas on and north of the line of the Texas and Pacific Railway Company from El Paso to Fort Worth, Tex., and on and west of the Gulf, Colorado and

Santa Fe Railway from Fort Worth to Thackerville, Okla., and those in Oklahoma, except in Bryan County, to the port of Corpus Christi, Tex., are and for the future will be, unduly prejudicial to that port and unduly preferential of the ports of Houston and Galveston, Tex., to the extent that the rates to Corpus Christi exceed the corresponding rates to the latter ports.

COMMISSIONER FREAS, dissenting in part:

I disagree with the finding of undue preference and prejudice. To support such a finding it must be established that transportation conditions at the allegedly preferred and prejudiced points are substantially similar. As I see it, they are not.

It is ordered, That the defendants named in the complaints, to the extent that they participate in the transportation, be, and they are hereby, notified and required to cease and desist on or before July 26, 1965, and thereafter to abstain, from practicing the undue prejudice and preference found herein to exist.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby notified and required to establish, on or before July 26, 1965, upon not less than 30 days' notice to this Commission and to the general public by filing and posting in the manner prescribed under section 6 of the Interstate Commerce Act, and thereafter to maintain and apply rates which will prevent and avoid the undue preference and prejudice found herein to exist.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission, division 2.

BERTHA F. ARMES,
Acting Secretary.

(SEAL)

APPENDIX

*Representative rail export rates on cotton in effect October 29, 1964, with the docket No. 28300 distances**

From—	To— Corpus Christi, Tex. Distance	Col. 1	Col. 2	Col. 3	To— Houston-Galveston, Tex. Distance	Col. 1	Col. 2	Col. 3
	Miles	Cents	Cents	Cents	Miles	Cents	Cents	Cents
New Mexico:								
Clovis	735	111	100	92	614	99	89	80
Carlsbad	735	117	107	99	614	105	93	85
Las Cruces	500	111	100	92	860	111	100	92
Lovington	710	102	91	83	589	102	91	83
Portales	735	111	100	92	614	99	89	80
Roswell	735	117	107	99	637	105	93	85
Oklahoma:								
Altus	592	116	105	98	451	80	69	59.5
Durant	499	107	96	88	336	70	59.5	52.5
El Reno	611	116	105	98	470	80	69	59.5
Guthrie	638	116	105	98	479	90	79	70
Muskogee	636	116	105	98	473	80	69	59.5
Tulsa	682	121	110	103	518	90	79	70
Texas:								
Abilene	500 (1)	75	64.5	57.5	379	70	59.5	52.5
	(2)	70	59.5	52.5		70	59.5	52.5
Childress	622	84.5	73.5	63.5	480	79.5	68.5	58.5
Dallas	415 (2)	76	67	57.5	261	54.5	44.5	38.5
	(1)	59.5	49.5	43.5		54.5	44.5	38.5
Denton	437	63.5	55.5	46.5	281	58.5	50.5	41.5
Dimmit	736	90.5	79.5	69.5	615	85.5	74.5	64.5

From—	To Corpus Christi, Tex.				To Houston-Galveston, Tex.			
	Distance	Col. 1	Col. 2	Col. 3	Distance	Col. 1	Col. 2	Col. 3
	Miles	Cents	Cents	Cents	Miles	Cents	Cents	Cents
El Paso ..	756	111	100	92	816	111	100	92
Fort Worth	415 (1)	59.5	49.5	43.5	261	54.5	44.5	38.5
	(2)	54.5	44.5	38.5		54.5	44.5	38.5
Lamesa ..	678	84.5	73.5	63.5	561	79.5	68.5	58.5
Littlefield	683	84.5	73.5	63.5	561	79.5	68.5	58.5
Lubbock	646	84.5	73.5	63.5	525	79.5	68.5	58.5
Marshall ..	462	80	69	59.5	255	54.5	44.5	38.5
Pecos	729 (2)	97	85	77	608	97	85	77
	(3)	108	98	90		105	93	85
Sherman ..	470	68.5	59.5	49.5	307	63.5	54.5	44.5
Seymour ..	567	75	64.5	57.5	426	70	59.5	52.5
Sweetwater	530 (1)	76	65.5	58.5	409	71	60.5	53.5
	(2)	71	60.5	53.5		71	60.5	53.5
Wichita Falls	515	75	64.5	57.5	374	70	59.5	52.5

Col. 1—Minimum 25,000 pounds.
Col. 2—Minimum 50,000 pounds.
Col. 3—Minimum 65,000 pounds.
(1) Defendants other than Texas & Pacific and associated lines.
(2) Texas & Pacific and associated lines.
(3) Panhandle & Santa Fe only.

* *Class Rate Investigation, 1939,* 262 I.C.C. 447, and later reports.